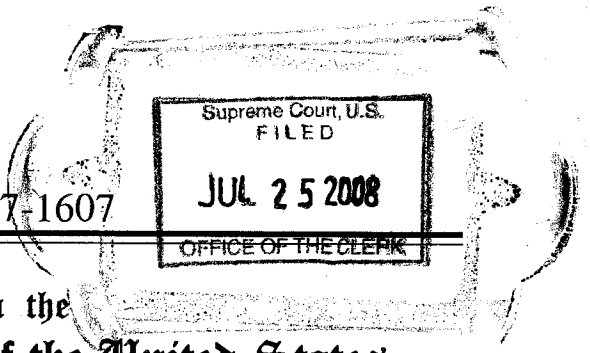

No. 07-1607

In the
Supreme Court of the United States

SHELL OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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July 25, 2008

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Civil Justice Association of California (CJAC or amicus) is a 30-year old non-profit organization dedicated to educating the public about ways to make our civil liability laws more fair, efficient, uniform and economical. CJAC's hundreds of members are businesses, professional associations and local government groups who, in response to the vicissitudes of economic life, too often become embroiled in litigation over who gets how much, from whom, and under what circumstances when unlawful conduct is charged. Accordingly, CJAC has, since its inception, petitioned the three co-equal and co-ordinate branches of the federal and California governments to provide greater clarity and fairness to the laws that inform the answers to these questions.

Amicus is vitally interested in two issues this case presents: (1) whether a manufacturer who merely "sells" a useful product (*i.e.*, agricultural fertilizer) to a purchaser who, upon delivery acquires ownership

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[1] Counsel of record for all parties consent to the filing of this *amicus* brief. Counsel either received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief or Counsel waived their right to receive at least 10 days notice. The parties' consent to the filing of this brief and the 10-day waivers of notice (where applicable) are being filed concurrently with this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

and control of it, can be held liable as an "arranger" under the CERCLA (42 U.S.C. § 9607 (a)(3)) for the purchaser's "spillage" of the product; and (2) whether judicial "apportionment" of remedial clean-up costs under CERCLA at the liability stage can be decided on the basis of a "reasonable estimate" of the comparative responsibility of the parties, or requires more exacting information tracing and tying specific contamination at the site to each party responsible for it.

The Ninth Circuit answered "yes" to the first question about "arranger" liability under CERCLA and, while paying "lip service" to the "reasonable estimate" of apportioned clean-up costs amongst responsible parties for contamination of the site, imposed a more difficult and burdensome threshold requirement on defendants that, as a practical matter, makes apportionment impossible at the liability stage of CERCLA proceedings.[2] These two holdings are harshly unfair and conflict with opinions from other circuits. Left intact this opinion will exacerbate confusion from inconsistent judicial holdings about key aspects of CERCLA administration and enforcement.

Uniformity as to the scope of CERCLA liability is essential for potentially responsible parties to adequately protect themselves by complying with legal requirements. Lack of uniform federal CERCLA arranger liability and apportionment decisions results in uncertainty, increases litigation, creates questions

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[2] *United States of America v. Burlington Northern & Santa Fe Railway Company*, 520 F.3d 918 (9th Cir. 2008). ("*Burlington Northern*")

of legal complexity, promotes forum shopping, and produces unreasonable burdens and costs on litigants. The Court's guidance on the two important issues presented is urgently needed to bring clarity and consistency to what is now a confused and confounded state of CERCLA law.

BACKGROUND AND PROCEEDINGS BELOW

Under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA", 42 U.S.C. § 9601), federal and state governments can clean up hazardous waste sites and later sue potentially responsible parties for reimbursement. Since CERCLA's 1980 enactment, its effect on businesses in the United States has been tremendous.

> "Businesses spend over thirty million dollars cleaning up an average Superfund site, with larger sites costing businesses over 100 million dollars. By 1991, businesses spent over 11.3 billion dollars on CERCLA cleanups. Obviously, liability for even a single Superfund site has disastrous effects on a business, and the cost to businesses is going up. By even the most conservative estimates, the total cost of cleaning all Superfund hazardous waste sites in the United States will be well over 100 billion dollars."[3]

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[3] Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Businesses at Superfund Sites*, 23 *VT. L. REV.* 59 (1998).) While the estimates of

In 1983, the Environmental Protection Agency (EPA) and the California State Department of Toxic Substances Control (DTSC) separately investigated an agricultural chemical storage and distribution facility in Arvin, California to determine whether repeated leaks and spills had caused soil and groundwater contamination. Finding several violations of hazardous waste laws, the agencies proceeded to clean up the site and in doing so incurred substantial cost.

In 1996, the United States, acting through the EPA and DTSC brought a CERCLA suit against Brown & Bryant, Inc. (B & B), owner and operator of the facility; Burlington Northern & Santa Fe Railway and Union Pacific Transportation Co. (Railroads), part landowners of the facility; and Shell Oil Company (Shell), distributor of a soil fumigant called D-D – a nematocide that, when injected into soil protects crop roots from attack by microscopic worms. The district court determined that the harm sustained at the site was capable of apportionment and apportioned the harm between the Railroads as "owners" and Shell as an "arranger." B & B was insolvent. For the Railroads, the district court multiplied the percentage of ownership, percentage of time owned in relation to total operations, and fraction of hazardous products attributable to the Railroads' parcel to determine that

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CERCLA cleanup costs vary, spending is certainly exorbitant. The cleanup of an individual CERCLA site may range from $26 million to $50 million. See Jerry L. Anderson, *The Hazardous Waste Land*, 13 *VA. ENVTL. L.J.* 1, 10 n.50 (1993). Total nationwide cleanup costs could be as high as $750 billion. See John T. Ronan III, *A Clean Sweep on Cleanup*, *THE RECORDER*, Sept. 30, 1992, at 10, available in LEXIS, News Library, Recrdr File.

the Railroads were liable for 9% of the total cleanup costs. For Shell, the district court multiplied the percentages of leaks attributable to Shell to determine that Shell was liable for 6% of the total cleanup costs. Both parties appealed the judgment: the EPA and DTSC arguing that the Railroads and Shell are jointly and severally liable for the entire judgment, and Shell arguing that it is not an "arranger" under CERCLA and therefore not a party on whom any cleanup liability should be imposed.

The Ninth Circuit, relying heavily on *U.S. v. Chem-Dyne, Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), held that liability may be joint and several at the liability phase (thus allowing for apportionment of liability), but ultimately disagreed with the district court's method of apportionment. (*Burlington Northern supra*, 520 F.3d at 946.) Regarding the Railroads, the Ninth Circuit found that the factors the district court used (percentages of land area, time of ownership, and types of hazardous products) bore an insufficient logical connection to the pertinent question: what part of the contaminants found on the land in question were attributable to the presence of toxic substances or to activities on the Railroad parcel? The Ninth Circuit rejected the district court's apportionment calculation and held that the Railroads had failed to prove a "reasonable basis" for apportioning liability. With regards to Shell, the Ninth Circuit found that because the appropriate consideration for apportionment is contamination, by presenting evidence of leakage Shell failed to prove whether its chemicals that were leaked had contaminated the soil in any specific proportion as compared to other chemicals spilled at the site. The Ninth Circuit held that Shell's evidence concerning

leakage was insufficient to prove a "reasonable basis" for apportionment of liability.

Finally, the Ninth Circuit agreed with the district court that Shell was an "arranger" for purposes of CERCLA. On appeal Shell claimed that the district court used the wrong standard in determining whether it was an "arranger," that the "useful product" doctrine precludes imposition of "arranger" liability on Shell, that Shell lacked ownership and control over the chemicals at the time of the transfers, and the district court erred when it determined Shell contributed to the groundwater contamination. The Ninth Circuit rejected Shell's arguments, finding that an entity can be an "arranger" even if it did not intend to dispose of the product because under CERCLA, "dispose" can mean "spill"; the "useful product" doctrine does not apply where the sale of a useful product immediately results in the leakage of hazardous substances; Shell had sufficient control over, and knowledge of, the transfer process to be considered an "arranger" under CERCLA; and the record was sufficient to support the district court's conclusion.

Upon denial of rehearing en banc, seven judges of the Ninth Circuit, including Chief Judge Kozinski, joined the dissent by Judge Bea stating that the panel's opinion on "arranger" liability creates . . . circuit conflicts in an area of the law where uniformity . . . is of paramount importance." (*Burlington Northern, supra*, 520 F.3d at 952-953.) The dissent also criticized the opinion for imposing a "novel and unprecedented" test for apportionment of liability that was "impossible" for CERCLA defendant to "satisfy."

SUMMARY OF ARGUMENT

The Ninth Circuit panel opinion in this case directly conflicts with that of other circuits on the scope of CERCLA "arranger" liability and what is necessary for apportionment of clean-up costs at the liability stage of CERCLA proceedings. These conflicts create uncertainty and confusion amongst businesses and governments as to what is required to avoid or obtain CERCLA liability, resulting in excessive litigation, forum shopping and exorbitant costs to business, consumers who pay for products or services, and the taxpaying public.

"Arranger" liability under CERCLA should not attach to a bona fide seller of a useful product who relinquishes ownership and control of the product upon its delivery to the buyer. That is the law in every jurisdiction except, as a result of this opinion, the Ninth Circuit. Nor should apportionment of CERCLA clean-up costs be denied at the liability phase of litigation due to the absence of "adequate records" for which there is no utility for anyone to maintain. That, again because of this opinion, can now occur only in the Ninth Circuit.

Bad law should be nipped in the bud lest it infect future courts considering similar or analogous issues. The opinion in this case is "bad" law, not because it is animated, as Holmes intimated, by "hard facts;"[4] but because it is at odds with better reasoned decisions

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[4] "Great cases, like hard cases, make bad law." *Northern Securities Co. v. United States,* 193 U.S. 197, 400 (1904).

from other circuits and common-sense. The Court should avail itself of the opportunity to reconcile decisions from a majority of circuits on CERCLA "arranger" liability and "apportionment" with this outlier case subject to the writ petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE OPINION EXPANDS "ARRANGER" LIABILITY UNDER CERCLA IN WAYS THAT EXACERBATE CONFLICTS WITH AT LEAST FIVE OTHER CIRCUITS ON THE SAME POINT OF LAW.

The opinion affirmed the district court's imposition of CERCLA "arranger" liability[5] on Shell even though it is undisputed that Shell sold and relinquished control over a "useful product" (*i.e.*, the agricultural fertilizer "D-D") upon its delivery and before any spillage of the product occurred by the buyer. As the

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[5] "CERCLA imposes status-based strict liability on four categories of 'covered persons' identified in CERCLA section 107(a)(1)-(4): (1) the current owner and operator of contaminated property; (2) the owner or operator of contaminated property at the time a hazardous substance was disposed of at the property; (3) a non-owner or operator of the contaminated property who arranged to dispose of a hazardous substance at the property; and (4) persons who transported hazardous substances to the contaminated site. CERCLA liability is retroactive and does not require proof of causation. CERCLA section 107(b) contemplates three narrow defenses to liability: (a) act of God; (b) act of war; and (c) act of a third party." Ronald G. Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes, 16 N.Y.U. ENVT'L. L.J.* 236-237 (2008).

en banc dissent says of this holding, it "goes far beyond the statutory language and creates inter- and intra-circuit splits." *Burlington Northern, supra*, 520 F.3d at 954.

One of these "splits" is with the Seventh Circuit. In *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), the defendant, a chemical manufacturer, allegedly contracted for transportation of hazardous waste, which was subsequently spilled while filling the purchaser's storage tanks. The Seventh Circuit held that the defendant was not liable as an "arranger" because the defendant did not contract with the transporter for the purpose of spilling the hazardous waste on the premises. The court found that the critical words in governing liability as an arranger are "arranged for," implying "intentional action." Judge Posner, writing for the court, found that the words "arranged with a transporter for transport for disposal or treatment" appeared to contemplate a case in which an entity that desired to rid itself of its hazardous wastes hired a transporter to deliver the waste to a disposal site, not a case in which the entity provided a useful product. Therefore, the court concluded that a party does not "arrange for" disposal of hazardous waste unless it intentionally arranged for the disposal on the site.

The opinion here does not even cite, let alone attempt to distinguish or discuss, *Amcast*. Instead, the opinion asserts that because unintentional practices like "leaking" are included within definition of "disposal" under CERCLA, "disposal" need not be *purposeful*. But as the dissent points out, echoing *Amcast*:

> [T]hough the definition of "disposal" may include unintentional practices, mere "disposal" does not constitute *arranger* liability. Instead, arranger liability requires the defendant to have "arranged for" such *disposal* (not just arranged for the sale). This connotes an intentional action toward achieving the purpose: disposal. *See* Webster's *Third New International Dictionary* 120 (1993) (defining "arrange" as "to make preparations for"). It is an oxymoron for an entity *unintentionally* to make preparations for disposal.[6]

By holding that a defendant can be held liable as an "arranger" for the mere sale of a product, the opinion also directly conflicts with opinions from the Sixth and Eleventh Circuits. *See, e.g., AM Int'l, Inc. v. International Forging Equipment Corp.*, 982 F.2d 989, 999 (6th Cir. 1993) ("[C]ourts . . . have consistently held that the mere sale of a product is not 'arranging for disposal' under [CERCLA]."); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) ("If a party merely sells a product, without additional evidence that the transaction includes an 'arrangement' for the ultimate disposal of a hazardous substance, CERCLA liability [can]not be imposed.").

The Ninth Circuit opinion conflicts too with *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999), which explains why sellers of useful hazardous substances are not subject to arranger liability. Glaxo, upon closing a facility, sold chemical reactants used in

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[6] *Burlington Northern, supra,* 520 F.3d at 961.

its facility to Freeman Industries Incorporated (FII) for use in FII's business. FII used some of the chemicals in its business, stored some of them, and sold some of them. The stored chemicals became the source of a remedial action by the EPA at the FII facility. FII commenced a third party action for contribution against Glaxo, claiming that Glaxo had arranged for disposal of its chemicals at the FII facility. Glaxo's defense was, as Shell argued here, that it merely sold the chemicals and did not arrange for their disposal. After citing cases holding that one cannot circumvent the Superfund Law by characterizing disposal as a sale, the court noted that Glaxo sold valuable products to FII for use or resale. The court determined that these were virgin chemicals, not waste, and liability for the arrangement for disposal requires the presence of waste. Therefore, Glaxo did not arrange for disposal at the FII facility.

Similarly, *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769 (4th Cir. 1998) provides further analysis of how to determine whether a transaction is a sale or an arrangement for disposal. The court explained that the key factors "[i]n determining whether a transaction was for the discard of hazardous substances or for the sale of valuable materials" were the intent of the parties, the value and state of the materials, and the usefulness of the product. The transaction in *Pneumo* was for the sale of used bearings to be processed into new bearings. The processing generated waste, but the court found that the essence of the transaction was payment in exchange for bearings, not an attempt to dispose of unwanted metal. Thus, the seller did not arrange for disposal.

Finally, to reach the extraordinary expansion of "arranger" liability that it did here, the Ninth Circuit was forced to downgrade a previous opinion on the importance of "actual control" over the hazardous product as a "crucial element" and relegate it instead to a mere "pertinent consideration." Compare *United States v. Shell Oil Co.*, 294 F.3d 1045, 1055, 1057 (9th Cir. 2002) ("We agree. . . . that *control is a crucial element of the determination of whether a party is an arranger.*") with the court's statement herein that "ownership and control at time of disposal are useful indices" or "pertinent considerations" which are "informative only in light of additional considerations" for determining arranger liability. (*Burlington Northern, supra,* 520 F.3d. at 950-951.)

Numerous courts and legal scholars have commented on the split between circuits concerning the scope and analysis of, and the "controlling" factors necessary to determine, arranger liability under CERCLA.

- "With arguably ambiguous statutory language and inadequate legislative guidance, the courts have resorted to their own perceptions and interpretations regarding CERCLA. As a result, copious case law exists concerning . . . arranger liability . . .. It therefore should come as no surprise that *judicial approaches to arranger liability have not been consistent.* Modern courts have adopted three fundamentally *dissimilar* approaches: (1) a strict liability approach; (2) a specific intent approach; and (3) a "totality of the circumstances," case-by-case approach." (David

W. Lannetti, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent*, 40 WM. & MARY L. REV. 279, 290-91 (1998); emphasis added.)

- "[A]s a consequence of the unusually rapid passage of [CERCLA], there is little legislative history to guide the courts in interpreting the statute. 'Lacking direction from the traditional tools of statutory construction, and unable to wait for Congress to correct the errors, the courts interpreting CERCLA muddle along.' This has resulted in *inconsistent decisions and significant jurisdictional differences*." (Sarah E. Stevenson, *Broadening Arranger Liability under Alaska State Law: the Ninth Circuit's Interpretation of Berg v. Popham*, 17 VILL. ENVTL. L.J. 76-77 (2006); emphasis added; citations omitted.)

- "Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability." (*United States v. New Castle County*, 727 F. Supp. 854, 871 (D. Del. 1989); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (legislative history "sheds little light on the meaning of the intended phrase").)

- "The Third Circuit found that . . . the most important factors in determining 'arranger liability' *varied* between courts. Some courts

> required a showing of intent to dispose of or treat hazardous waste, while others held that the party could be liable as an 'arranger' even if it merely owned and/or controlled the hazardous substances at issue. The Third Circuit decided that the 'most important factors' in the standard for 'arranger liability' were 'ownership or possession' and 'knowledge[]; or control.'" (Melissa Thrailkill, *The Third Circuit Clarifies Arranger Liability under CERCLA*, 31 *ECOLOGY L.Q.* 739, 741 (2004).)

This case presents the Court with a unique opportunity to provide much needed clarity and uniformity between the circuits on what constitutes "arranger" liability under CERCLA and how courts should go about making that determination.

II. THE OPINION IMPOSES AN IMPRACTICAL AND UNWORKABLE "ADEQUATE RECORDS" REQUIREMENT FOR APPORTIONMENT OF CLEAN-UP COSTS TO OCCUR AT THE LIABILITY STAGE OF CERCLA PROCEEDINGS.

Liability under CERCLA is normally joint and several where each defendant is potentially liable for the entire amount of clean-up costs, with the possibility of then seeking contribution from other defendants. Some courts, however, have allowed apportionment of responsibility on the basis of equitable factors at the liability stage. See, e.g., *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996) ("Liability under the Act is joint and several, unless potentially responsible parties can prove that the harm

is divisible."); *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989) ("[D]amages should be apportioned only if the defendant can demonstrate that the harm is divisible."); cert. denied *sub. nom*, *American Cyanamid Co. v. O'Neil*, 493 U.S. 1071 (1990). Congress intended CERCLA apportionment to be governed by common law tort principles and guided by the Restatement (Second) of Torts § 443. See, *e.g.*, *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895 (5th Cir. 1993).

The opinion in this case recognizes the appropriateness of apportionment at the liability phase of CERCLA litigation, but then devises a test that, for all practical matters, obliterates that possibility. Not surprisingly, the stringent test devised by the opinion results in reversal of the district court's "reasonable basis" apportionment and saddles Shell and the Railroads with complete responsibility (joint and severally liability) for the total clean-up costs.

Factors to be considered by courts in determining whether apportionment is appropriate are explained in comment d to the *RESTATEMENT (SECOND) OF TORTS* § 433A(1), upon which other circuits apportioning CERCLA liability have relied:

> There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but

> it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.

Instead of cattle and crops, the district court considered the percentage of land ownership by various parties, the period in which the land was held in ownership by each, and the period of contamination to arrive at a "reasonable basis" for apportioning the respective costs to be borne by Shell and the Railroads. The district court's approach to apportionment was in keeping with the "whole point" of Restatement § 433A that, as the dissent remarks, "no specific evidence is required for apportionment so long as the evidence and method used are 'reasonable.'" (*Burlington Northern, supra,* 520 F.3d at 958.) Nonetheless, the Ninth Circuit reversed the district court's "apportionment" because the parties did not produce "adequate records" detailing "the amount of leakage attributable to activities on the Railroad parcel, how the leakage traveled to and contaminated the soil and groundwater . . ., and the cost of cleaning up the contamination." (*Burlington Northern, supra,* 520 F.3d at 957.)

Significantly, the opinion concedes that there would be little "utility" to either the operator of the waste facility or the owner of the land (not to mention the seller of the useful product) to make such records, but nonetheless faults the absence of such records as grounds for reversing the district court's apportionment.

Under the opinion's reasoning, it is difficult to imagine any practical circumstances allowing for apportionment of clean-up costs between and amongst responsible parties. "Adequate records," as the opinion admits, are unlikely ever to be kept because there is no "utility" for parties to keep the kind of documentation the opinion says is now a prerequisite for CERCLA "apportionment."

The opinion in this case accepts the theory of apportionment, but saddles it with an unreasonable and burdensome requirement that effectively extinguishes future CERCLA apportionment. This is contrary to the law in numerous other circuits and Congressional intent. The Court should seize the opportunity to review this case for the purpose of reconciling and harmonizing the conflicting views of the circuits on what is required for CERCLA apportionment.

CONCLUSION

For all the aforementioned reasons, the Court should grant the petitions for certiorari filed by Shell Oil Co. and the Railroads and consolidate both for argument.

Respectfully submitted,

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